(5)

Supreme Court, U.S.
FILED
MAR 4 - 2004
OFFICE OF THE CLERK

No. 03-898

IN THE

Supreme Court of the United States

MIGUEL G. ORTIZ VELEZ, MAYOR OF THE MUNICIPALITY OF SABANA GRANDE; MUNICIPALITY OF SABANA GRANDE, PETITIONERS

v.

SANTOS RIVERA-TORRES; DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR

RECEIVED
MAR 8 - 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

FRANK GUERRA
PONTIFICAL CATHOLIC UNIV. OF PUERTO RICO, SCHOOL OF LAW
Ponce PR 00717-0777
(787) 348-4038

CARLOS DEL VALLE*
PO Box 9022473
San Juan PR 00902-2473
(787) 306-8298

* *Counsel of Record and Authorized Law Officer for Amici Municipalities of Adjuntas, Aguada, Aibonito, Arecibo, Barceloneta, Caguas, Carolina, Cayey, Ceiba, Coamo, Comerío, Culebra, Dorado, Guánica, Guayama, Guayanilla, Gurabo, Hatillo, Hormigueros, Humacao, Isabela, Jayuya, Juncos, Lajas, Lares, Maunabo, Mayagüez, Morovis, Naranjito, Peñuelas, Ponce, Rincón, Salinas, San Germán, San Lorenzo, Santa Isabel, Toa Alta, Toa Baja, Trujillo Alto, Vega Alta, Vega Baja, Vieques and Villalba.*

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

Whether the First Circuit properly held that the state of mind element of an underlying intent-based constitutional claim merges with the qualified immunity inquiry.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT

A. THE FIRST CIRCUIT'S SUBJECTIVE STANDARD INCORRECTLY FORECLOSES THE DEFENSE OF QUALIFIED IMMUNITY IN CASES INVOLVING INTENT-BASED CONSTITUTIONAL CLAIMS 3

B. THE FIRST CIRCUIT'S SUBJECTIVE STANDARD PRODUCES UNCERTAINTY AND INCONSISTENCY IN THE ADJUDICATION OF CIVIL RIGHTS CLAIMS 9

C. THE SUBJECTIVE STANDARD HELPS PRODUCE TOO MUCH FEDERAL LITIGATION 12

D. THE SUBJECTIVE STANDARD IS AN INEFFICIENT METHOD FOR DETERRING CONSTITUTIONAL WRONGS 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

ACEVEDO-GARCÍA V. VERA-MONROIG, 204 F.3D 1, 7 (1ST CIR. 2000) 6

CRAWFORD-EL V. BRITTON, 523 U.S. 574, 588-89 (1998) 5

CRAWFORD-EL V. BRITTON, 93 F.3D 813, 833 (D.C. CIR. 1996) 11

FABIANO V. HOPKINS, 245 F. SUPP. 2D 305 (D. MASS 2003) 8

FABIANO V. HOPKINS, 352 F.3D 447 (1ST CIR. DEC. 9, 2003) 8

HARLOW V. FITZGERALD, 457 U.S. 800 (1982) 2, 5

MITCHELL V. FORSYTH, 472 U.S. 511, 517 (1985) 2

MONROE V. PAPE, 365 U.S. 167 (1961) 12

MT. HEALTHY CITY BD. OF ED. V. DOYLE, 429 U.S. 274 (1977) 3

PIERSON V. RAY, 386 U.S. 547 (1967) 3, 4

RIVERA-TORRES V. VÉLEZ-ORTIZ, 341 F.3D 86 (1ST CIR. 2003) 6, 8, 15

SAUCIER V. KATZ, 533 U.S. 194, 201 (2001) 5

WOOD V. STRICKLAND, 420 U.S. 308 (1975) 4

OTHER AUTHORITIES

42 U.S.C. § 1983 1

INTEREST OF THE AMICI CURIAE

The municipal governments of Adjuntas, Carolina, Humacao and Trujillo Alto have a direct interest in the law relating to qualified immunity, particularly the standards at issue in this case. Qualified immunity applies in civil actions against municipal personnel in their individual capacities for money damages under 42 U.S.C. § 1983. The municipalities often represent their government employees in federal civil rights actions and have an interest in protecting such employees from meritless and unduly burdensome litigation. The municipalities also have an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights. For these reasons, amici respectfully submit this brief in support of the Petitioner's petition for writ of *certiorari*.[1]

SUMMARY OF ARGUMENT

In mathematics as in science, it is imperative to identify and understand the nature of the problem one is trying to solve before actually attempting to find its solution. See, e.g., G. Polya, How to Solve It: A New Aspect of Mathematical Method 7-8, 33 (2d ed. 1971). At bottom, the root problem before this Court is the split among the circuits regarding the day-to-day application of the qualified immunity doctrine. Some circuits, including the First Circuit, have disregarded this Court's qualified immunity precedents by imposing a subjective intent element into the qualified immunity doctrine. As we see it, all the other issues raised in this appeal arise out of this fundamental problem.

What, then, is the role "subjective intent" should play in

---

[1] Counsel of record has been retained as the authorized law officer for the municipalities of Adjuntas, Carolina, Humacao and Trujillo Alto for the purpose of appearing on their behalf pursuant to Rule 37.4 since amici Municipalities do not employ any law officers admitted to practice before the Supreme Court.

the qualified immunity doctrine? Happily, the answer is as simple and straightforward as can be: subjective intent should play absolutely no role at all.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court created a single, uniform, across-the-board objective standard for the evaluation and application of the qualified immunity doctrine for *all* qualified immunity cases. Id. at 817 ("bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery"). To be even more precise, this Court "purged" the subjective element altogether from the qualified immunity doctrine. Mitchell v. Forsyth, 472 U.S. 511, 517 (1985).

The First Circuit, however, along with a handful of other circuits have *sua sponte* created a remarkable exception to this Court's uniform objective standard. Specifically, the First Circuit's exception applies to all causes of actions in which the government official's subjective intent is an essential element of the plaintiff's substantive claim (as in the present case). In these types of cases, all bets are off, so to speak, at least in the First Circuit and a few other circuits.

The fundamental problem with the First Circuit's exception—aside from the fact that it disregards this Court's clear and unambiguous precedents establishing a single, uniform objective standard—is that it opens a veritable Pandora's box of troubles. Specifically, the First Circuit's subjective standard departs from this Court's jurisprudence and presents intra-circuit conflicts (see part A below); it creates uncertainty and instability in the day-to-day application of the qualified immunity doctrine (see part B below); it generates a large and artificially high number of civil rights claims (see part C below); and it imposes enormous social costs on municipalities and the public at large (see part D below). Let us examine these various evils in turn.

ARGUMENT

A. THE FIRST CIRCUIT'S SUBJECTIVE STANDARD INCORRECTLY FORECLOSES THE DEFENSE OF QUALIFIED IMMUNITY IN CASES INVOLVING INTENT-BASED CONSTITUTIONAL CLAIMS.

The single most important issue presented in this case is the role that intent plays in the assessment of a public officer's entitlement to qualified immunity. Through its opinion below, the First Circuit was straightforward in its position: any doubt as to the public officer's intent (when motive is an element of the underlying claim) sends the case directly to trial and the defendant cannot avail himself of the qualified immunity shield.

In First Amendment cases such as the one at bar, the plaintiff is required to make a showing that her protected speech was a substantial or motivating factor in the adverse decision challenged. Mt. Healthy City Bd. Of Ed. v. Doyle, 429 U.S. 274 (1977). This burden requires nothing more than a mere showing of improper intent. If at the summary judgment stage the plaintiff fails to establish a triable issue as to her protected conduct being a substantial or motivating factor in the adverse decision, there is no prima facie case and the action is dismissed. This scenario, where Plaintiff fails to meet her prima facie burden as to the state of mind of the Defendant, also happens to be the only scenario in which, according to the First Circuit, qualified immunity would be properly applied.

The first formulation of a conditional immunity can be found in the case of Pierson v. Ray, 386 U.S. 547 (1967), a false arrest case arising out of the enforcement of Jim Crow laws against Black and White ministers attempting to use a segregated bus facility. The Pierson Court was faced with the dilemma that "the common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to

one". Id. at 555. In assessing that the officers were executing what at the time they believed to be a facially-valid statute and there was probable cause to enforce it, the Court determined that redress under § 1983 was simply not available ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."). Id. at 557.

Reliance on the subjective element of good faith was modified in Wood v. Strickland, 420 U.S. 308 (1975). Wood enounced a bifurcated query with both a subjective (good faith) and an objective (status of the law) element:

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

Wood, 420 U.S. at 321

After Wood, this Court announced in Harlow the contemporary view of the qualified immunity defense. This Court's new rule (and the policies behind it) could have not been stated more clearly in Harlow. As this case proves, an inquiry into motive becomes a critical issue when courts seek *de brevis* disposition of the issue by way of summary judgment:

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may

> not be decided on motions for summary judgment and an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Harlow, 457 U.S. at 816.

Accordingly, this Court instituted a single, objective standard to determine the applicability of qualified immunity. However, the First Circuit in the case below has seen it fit to modify this Court's articulation of the objective test for qualified immunity out of a concern that if an inquiry into motive is not made, government officers would receive a *carte blanche* to disregard civil rights. This concern was not lost upon the Harlow Court: "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct.". Id. at 819. This Court held, however, that the objective inquiry into those particularized rights which are clearly established, a question that has occupied this Court for the twenty years since Harlow, appropriately protects these interests.

This Court's contemporary qualified immunity analysis consists of a three-pronged test. First, the Court must determine whether or not the plaintiff has set forth a constitutional violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). The next two steps require the determination of whether the right asserted was clearly established at the time and whether a similarly-positioned officer would have reacted the same way.

Neither Harlow nor Crawford-El v. Britton, 523 U.S. 574, 588-89 (1998), advocates application of intent to any particular part of the qualified immunity analysis. Under the First Circuit's interpretation of qualified immunity, if the plaintiff has put forth a cognizable constitutional claim for which intent is an element, qualified immunity is denied. This line of reasoning simply perverts the purpose of the first prong. Obviously, for an intent-based constitutional claim, a showing of intentionality is an indispensable issue of fact that requires evidentiary support. Under Saucier, the satisfaction

of the first prong (i.e. the determination that a constitutional violation has been pled[2]), does not mean that qualified immunity is defeated. On the contrary, meeting the first prong triggers the applicability of qualified immunity for immunity is meaningless if there is no underlying violation.

Although petitioners set forth thoroughly the inter-jurisdictional conflicts which exist on the issue of subjective intent, at the time petitioners sought this Court's review the only opinions setting forth the First Circuit's construction of Crawford-El were all written by the Honorable Kermit V. Lipez. See Acevedo-García v. Vera-Monroig, 204 F.3d 1, 7 (1st Cir. 2000); Rivera-Torres v. Vélez-Ortiz, 341 F.3d 86 (1st Cir. 2003). Significantly, although these First Circuit opinions conclude that this Court's decision in Crawford-El requires the rejection of a qualified immunity defense at the pretrial stage of an intent-based claim when motive is contested, neither opinion makes any reference to the majority opinion in Crawford-El, relying only on the dissent of Chief Justice Rehnquist.

Since the submission of the petition for writ of certiorari in this case, the First Circuit has issued two other opinions which attempt to fill the void left by Acevedo-García and Rivera-Torres concerning the reasoning behind their dissent-based construction of Crawford-El. These two recent First Circuit opinions, which deal with First Amendment claims and the application of qualified immunity, expose an intra-circuit split.

In Mihos v. Swift, 2004 U.S. App. LEXIS 2427 (1st Cir. Feb. 13, 2004), the First Circuit, in an opinion authored by Circuit Judge Lipez, reversed a judgment in favor of the former acting Governor of Massachusetts on the grounds that the district court erred in granting a dispositive motion on the basis of qualified immunity after the Plaintiff had satisfied

---

[2] On summary judgment, it would have to be determined whether the Plaintiff has established factual issues as to a possible constitutional violation as per Rule 56(c) of the Federal Rules of Civil Procedure

the elements of a First Amendment violation.[3] The First Circuit's general idea of Crawford-El, as stated in Mihos, is that the decision "confirmed that although Harlow eliminated inquiries into the defendant's subjective state of mind in the third step of the qualified immunity analysis, it did not eliminate inquiries into the defendant's subjective state of mind in the first step of the qualified immunity analysis when plaintiff alleges an intent-based constitutional tort." Id. at 32.

The First Circuit's interpretation of this Court's qualified immunity doctrine seems to be a throwback to the beginnings of what we now call qualified immunity. This "good faith" defense to § 1983 claims has consistently evolved to its current incarnation from a defense that was 100% subjective to one that is 100% objective. In its panel opinion in Mihos, the First Circuit attempts to bring back subjectivity to the qualified immunity analysis by unilaterally imposing the limitations set forth in Harlow and Crawford-El to particular portions of the qualified immunity analysis. The panel argues that the removal of the subjective element of intent only affected the third step of the qualified immunity analysis. Id. at 30 ("This "adjustment of the 'good faith' standard" was a reformulation of the third step of the qualified immunity test to eliminate the good-faith, subjective inquiry"). Therefore, the First Circuit reasons, "Harlow, then, did not affect the first step of the qualified immunity analysis: whether plaintiff's allegations, if true, establish a

---

[3] The Court stated: "Given the importance of Swift's motivation for firing Mihos for his vote, we must pause to address Swift's argument in her brief that "the state of mind of the public official is not relevant to the question of qualified immunity," citing to Harlow v. Fitzgerald. This argument, along with citations to Harlow, is often made in First Amendment retaliation cases when defendants raise the qualified immunity defense. We are mindful that the Supreme Court in Harlow changed qualified immunity doctrine to emphasize the objective, not subjective, nature of that inquiry. However, Harlow does not stand for the proposition that inquiries into defendants' subjective motivation is inappropriate in the first step of the qualified immunity analysis in assessing whether an intent-based constitutional violation has been alleged." Mihos at 26-27.

constitutional violation." Id.

The First Circuit itself is obviously split as to this issue. In Fabiano v. Hopkins, 352 F.3d 447 (1st Cir. Dec. 9, 2003), a different panel of First Circuit judges[4] applied a qualified immunity standard which conforms to this Court's jurisprudence and departs sharply from the approach taken later in Mihos. Ironically, in Fabiano the District Court dismissed the case on the merits. See Fabiano v. Hopkins, 245 F. Supp. 2d 305 (D. Mass 2003). The court of appeals, *sua sponte*, affirmed on qualified immunity grounds. The Fabiano court engaged in a thorough examination concerning the first prong of the qualified immunity analysis (i.e. whether plaintiff had set forth a cognizable First Amendment claim) and, citing Mt. Healthy City Sch. Dist. Bd. of Educ., found: "In the third and final step in establishing a First Amendment violation, Fabiano must show that his protected speech was a substantial or motivating factor in the City's decision to fire him. **This requirement is satisfied**." Fabiano, 352 F.3d at 457 (Citations omitted; emphasis ours)

In contrast with the Mihos mandate (to deny qualified immunity upon a factual dispute as to improper motive), the Fabiano court proceeded to state that "having concluded that Fabiano's allegations arguably suffice to state a First Amendment claim, we proceed to the second step of the qualified immunity analysis and consider whether Fabiano's First Amendment right was "clearly established.". Ultimately, the right asserted by Fabiano was found to be abstract enough for a reasonably objective officer to conclude that her actions were in violation of clearly established law. This is the way a qualified immunity claim should be assessed.

For all purposes, the First Circuit has eliminated the qualified immunity defense from intent-based claims. Their

---

[4] Mihos was decided by a panel comprised of Judges Lipez, Torruella and Schwarzer (of the Northern District of California); Fabiano was decided by Judge Howard and Senior Judges Stahl and Campbell.

interpretation that intent is still a relevant part of the first prong of the qualified immunity analysis, even if accepted, does nothing to compel the foreclosure of qualified immunity where intent is a contested element of the underlying claim. Accordingly, writ should issue to clarify this issue.

B. THE FIRST CIRCUIT'S SUBJECTIVE STANDARD PRODUCES UNCERTAINTY AND INCONSISTENCY IN THE ADJUDICATION OF CIVIL RIGHTS CLAIMS

In the first day of law school, most students are taught that the underlying goal of the law is to promote the values of consistency and predictability. See, e.g., Holmes, "The Path of the Law", 10 Harv. L. Rev. 457, 461 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). For the reasons described below, however, the subjective test sabotages this central and paramount goal of the law by mischievously subverting this Court's single, uniform objective standard.

First, from a pragmatic evidentiary point of view, it is practically impossible to actually prove a person's, any person's, subjective intent. As this Court itself duly noted in Crawford-El "an official's state of mind is easy to allege and hard to disprove." Id. at 584-85 (citation and internal quotation marks omitted). The probative difficulties are, frankly speaking, insurmountable. How do we know what the mayor in the present case, or any government official in any other case, was really thinking when he made *x* decision? A wide variety of possible motives may have crossed his mind at the time. How, then, do we determine which of the possible subjective motives was *the* motive that won out over all the others?

Second, the evidentiary difficulties described above increase litigation costs and promote the inefficient use of scarce judicial resources. To illustrate this point, one need only turn to Crawford-El. In Crawford-El, the plaintiff, a

convict serving a life sentence for murder, brought a First Amendment retaliation action against a prison official for allowing his boxes of personal belongings to be retrieved by his brother-in-law when the plaintiff was transferred to another prison. This seemingly innocent and simple question at the heart of Crawford-El resulted in a judicial quagmire of enormous proportions (a full *en banc* hearing by the court of appeals and review by this Court) consuming close to 100 pages of the Federal Reporter and U.S. Reports. Yet, despite the massive amount of judicial resources devoted to the Crawford-El litigation, we still don't know what really motivated the defendant's alleged retaliation against the plaintiff (i.e. the withholding of the infamous boxes).

Or take the present case. The plaintiff, a chronic absentee who missed over 60 days of work during a five-month period, brought a "political discrimination" action against his employer because the employer did not accept his letter of resignation by a specified date. Worst of all, the plaintiff had submitted his letter of resignation in an underhanded effort to avoid being disciplined for his chronic absenteeism. Who would have thought that under the First Circuit's subjective intent standard, the First Amendment now effectively protects a plaintiff's pathological absenteeism?

Third, the First Circuit's purported "exception" in reality threatens to swallow up the general rule of a single, uniform objective standard. We dare say that most members of the plaintiff's bar are clever enough (and, perhaps, cunning enough) to draft a complaint to fit the First Circuit's exception, converting the government official's intent (as opposed to his actions) as the basis of plaintiff's constitutional claim. In essence, the subjective test has the mischievous potential of converting literally every action taken by every government official into a constitutional violation. As Judge Silberman bluntly puts it in his concurring opinion in connection with the Crawford-El litigation, "virtually any ostensibly legal action taken by a government official can be thought unconstitutional if

prompted by an unconstitutional motive." Crawford-El v. Britton, 93 F.3d 813, 833 (D.C. Cir. 1996) (Silberman, J., concurring). That is, the same action, the same set of facts, can produce inconsistent results under the subjective standard, depending on the subjective intent of the government actor.

Fourth, the First Circuit's purported distinction between "thoughts" and "actions" does not hold much water, if any, at the end of the day. Although this is at bottom a deep and intractable philosophical question going back to Descartes, it is not unreasonable to say that all action is preceded by thought. Indeed, all action requires thought. Take the following simple example. Mr. X drinks a glass of water (a simple and straightforward action). But in order for Mr. X's hand to pick up the glass, his mind must have sent a command to his hand, ordering the hand to pick up the glass. And for his mind to send this command, Mr. X must have thought about the action of picking up the glass before he actually did so.

The simple act of picking up a glass of water can generate an inordinate amount of controversy under the First Circuit's subjective test. Applying the subjective standard, we must enter Mr. X's thought-processes and we are forced to ask why, then, did Mr. X pick up the glass of water? Was he simply thirsty? In fact, there are many other possible motives as well. Maybe he was motivated primarily for health reasons. That is, Mr. X really prefers bourbon, but his doctor told him to drink water instead. Or maybe he simply wanted to wash down some food he just ate. Perhaps he just wanted to cool down a bit, or clear his taste buds before drinking a cup of espresso. The length of our list of possible motives is limited only by our and this Court's imagination. But one is tempted to reply that Mr. X's motivation is perfectly obvious. And, yes, it is obvious, so long as we use an *objective* standard, that is, so long as we just look at the circumstances surrounding his action of picking up the glass of water.

The above example is precisely why this Court and the

law generally use an *objective* standard to evaluate the actions of an actor: we look to objective circumstances surrounding a given action, not the actor's subjective intent. Indeed, the use of subjective standards of liability is utterly inconsistent with the larger principles of our legal landscape. No less an authority than Oliver Wendell Holmes pointed out to us long ago that the general movement of the law, in such diverse areas as torts, contracts, and crimes, was from a subjective theory of liability to an objective one. Holmes explained that "the law's indifference to a man's particular temperament" was the most efficient way of adjudicating disputes and deterring harms. See O.W. Holmes, The Common Law 41 (M. Howe ed. 1963).

C. THE SUBJECTIVE STANDARD HELPS PRODUCE TOO MUCH FEDERAL LITIGATION

Mayors and other local government officials from the Commonwealth of Puerto Rico have repeatedly observed how the lower federal courts in Puerto Rico have used the First Circuit's subjective standard to defeat otherwise valid immunity claims under the objective standard, resulting in a huge increase in civil rights litigation (especially employment discrimination). Rather than offer anecdotal evidence to support this contention, and rather than limit our analysis to the woes of local governments in the Commonwealth of Puerto Rico, we shall extend our scope to the entire United States, reporting the actual raw data compiled by the Bureau of Justice Statistics of the U.S. Department of Justice, to give this Court some idea of the massive scale of the problem.

In 1961, the year this Court decided Monroe v. Pape, 365 U.S. 167 (1961) (dramatically expanding the scope and reach of 42 U.S.C. § 1983), only 296 civil rights actions against government officials were filed in all the lower federal courts. See, e.g., Eisenberg & Schwab, "The Reality of Constitutional Tort Litigation", 72 Cornell L. Rev. 641, 667 (1987). By 1990, the floodgates had been effectively opened, for the number of filings had expanded exponentially into

over 18,000. See Bureau of Justice Statistics, "Civil Rights Complaints in U.S. District Courts, 1990-98" (released January 2000). Another way for this Court to appreciate the spectacular growth of civil rights (especially employment discrimination) litigation in the lower federal courts is to express the raw numbers in terms of percentages. For example, the percentage growth of such filings between 1960 and 1983 was 7,350%, and between 1983 and 1995 it was 59%. See R. Posner, The Federal Courts: Challenge and Reform 100-101 (Table 4.2) (rev. ed. 1996) (Judge Posner's figures are based on the annual reports of the Director of the Administrative Office of the United States Courts). The former figure (7,350%) is admittedly very high because we are starting with a near zero baseline, but even the latter figure (59%) is significant when one considers that the average growth rate in all categories of cases filed between 1983 and 1995 was only 15.5%. Id.

The relevant statistics compiled by the Bureau of Justice Statistics of the U.S. Department of Justice confirm that this upward spiral of civil rights litigation has now apparently leveled off. In 2000, plaintiffs filed 40,098 civil-rights related complaints (after reaching an all-time high of 43,278 in 1997). See Bureau of Justice Statistics, "Civil Justice Data Brief: Civil Rights Complaints in U.S. Districts Courts, 2000" (released July 2002). Nevertheless, 41,000 is still a large number, representing approximately 15% of all civil cases filed in the lower federal courts. Furthermore, civil rights-related appeals accounted for about 22% of all civil cases filed in U.S. courts of appeals during the year 2000. Id. When one considers that the legal defense of a civil rights claim can cost from $50,000 to $250,000, one must conclude that the number of case filings has reached alarming proportions.

Of course, we understand that a country with a population as large and diverse and litigious as the United States is bound to generate an increasing amount of litigation in all categories. See, e.g., A. de Tocqueville, Democracy in

America 89-95 (J.P. Mayer & M. Lerner, eds., 1966). Nevertheless, we bring these damning statistics to the attention of this Court to demonstrate the significance of the main issue underlying this appeal for it appears that it has been the use of the subjective qualified immunity standard that has, in large measure, led to the unprecedented expansion of civil rights and employment discrimination claims. Simply put, in the absence of this subjective standard, many if not most of the civil rights claims being litigated today would not survive the summary judgment stage. In addition, the application of the subjective test imposes enormous social costs on local governments and, ultimately, on the public at large, as we shall explain below.

D. THE SUBJECTIVE STANDARD IS AN INEFFICIENT METHOD FOR DETERRING CONSTITUTIONAL WRONGS

Before we proceed, we wish to point out that this Court's single, uniform, and across-the-board qualified immunity doctrine (however imperfect it may seem to a handful of circuits and to the plaintiff's bar) is an attempt to balance a number of legitimate and competing goals, such as deterrence of constitutional violations, compensation to victims, and reduction of social and administrative costs.

The competing goals served by the qualified immunity doctrine are in many ways similar to the goals of tort law itself, and one of the main lessons of the economic analysis of tort law is that an efficient tort system is one that imparts the proper incentives to both potential victims and potential injurers, to both consumers and firms. See G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); W. Landes & R. Posner, The Economic Structure of Tort Law (1987). The same principle is true in the realm of constitutional torts. Civil rights law in general, and the qualified immunity doctrine in particular, should impart proper incentives to public employees and to government officials. See P. Schuck, Suing Government (1983).

Specifically, civil rights law should deter government officials from violating the constitutional rights of their public employees, but at the same time, civil rights law should not induce paralysis in day-to-day governmental decision-making. In short, civil rights law, like tort law generally, should strike the appropriate balance between underdeterrence and overdeterrence. Id. at 68-75.

It would be wise to remember that the resources of local governments--and those of the federal courts, who after all, must process civil rights claims—are limited. Yet, the expansion of municipal civil rights liability through the First Circuit's winnowing of qualified immunity has imposed huge direct costs on Puerto Rico's municipalities. These direct costs of liability act, in effect, as a tax on the production of public services.

To get some sense of these direct costs and the seriousness of the incentive problem, we need only look to the present case. The district court eventually awarded the plaintiff and his family a total of $536,400 in compensatory and punitive damages. See Rivera-Torres v. Ortiz, 341 F.3d 86 (1st Cir. 2003). Putting aside for the moment the possible incentive effects an award of over half a million dollars may have on other public employees, we consider the direct cost of the award to the Municipality of Sabana Grande (plaintiff's employer) and to the public at large. The Municipality of Sabana Grande's annual budget for fiscal year 1999-2000 was $5,544,086. See Puerto Rico Office of Comptroller, "Comptroller Annual Report for the Municipality of Sabana Grande" 4 (released Jan. 30, 2003). Put another way, plaintiff's award represents close to ten percent (.096) of the municipality's annual budget for 1999-2000. That is, roughly ten cents out of every dollar in the municipality's revenue stream represents a wealth transfer to the plaintiff.

The direct costs of civil rights (especially employment discrimination) claims filed against all Puerto Rico municipalities are staggering. According to the Puerto Rico

Office of Comptroller, no less than 27 of Puerto Rico's 78 municipalities, or roughly one-third (.346) of all municipalities, were required to pay out damages, or had pending judgments entered against them, arising out of employment discrimination claims, and the aggregate cost of these payouts and pending judgments was over $27 million. See Puerto Rico Office of Comptroller, "Special Report M-04-22," pp. 26-29 (released Dec. 5, 2003).

What is even more breathtakingly staggering is the potential liability of Puerto Rico's municipalities for all pending employment discrimination claims. According to the Puerto Rico Office of Comptroller, 67 of Puerto Rico's 78 municipalities face a potential liability of more than $1.7 billion. Id. at 33-37 (the exact figure is $1,723,717,702). When these liability statistics for Puerto Rico alone are seen in the aggregate, it becomes clear that the expansion of civil rights liability (and the shrinkage of qualified immunity due to the First Circuit's subjective standard) must be creating perverse incentive effects and rent-seeking behavior[5]. See, e.g., Rosenberg & Shavell, A Model in which Suits Are Brought for Their Nuisance Value, 5 Int'l Rev. of Law & Econ. 3-13 (1985). Who ultimately pays these direct costs?

The ultimate victim of the First Circuit's subjective standard is not the mayors and other local government officials of the Commonwealth of Puerto Rico who must now get bogged down in the intricacies of the discovery process and the rigors of lengthy federal trials; the ultimate victim is the public at large, who must bear the direct costs described above through a reduction in the quantity and quality of public services. The *quantity* of public services is reduced because local governments must now devote an ever-

---

[5] 'Rent-Seeking Behavior,' a term coined by economist Gordon Tullock, describes the expenditure of resources in order to bring about an uncompensated transfer of goods or services from another person or persons to one's self as the result of a 'favorable' decision on some public policy. See, e.g., James M. Buchanan, Robert D. Tollison, & Gordon Tullock, eds., Toward a Theory of Rent-Seeking Society (1980).

increasing share of their revenues to subsidize the direct costs of civil rights litigation. At the same time, the *quality* of public services is lowered because mayors will think twice before firing or otherwise disciplining lazy, corrupt, or otherwise inefficient public employees, especially if a particular employee belongs to the opposing political party. In fact, it may be cheaper for a mayor to not fire an inefficient employee, because the cost to the municipality of the employee's salary may be less than the expected value of the risk of incurring a potential damage award. See Schuck, *supra*, at 59-81.

The overall reduction, then, in both the quantity and quality of public services represents an additional social cost this Court should consider. A municipality's capacity to respond to local needs, to experiment to solve local problems, and to provide essential public services to the public could be severely restricted if excessive damage awards are imposed on it or if the law governing municipal liability is unclear or inconsistently applied.

There are about 87,900 local government units, including 19,341 municipal governments, in the United States as of June 30, 2002. See U.S. Census Bureau, "Government Units in 2002" (Charts A and B) (released July 2002). Municipalities and other local government entities in the Commonwealth of Puerto Rico and the United States provide a wide variety of essential public services, including fire protection, water supply, housing, sewerage, cemeteries, libraries, parks, roads, hospitals, education, and airports. See U.S. Census Bureau, "Special District Governments by Function: 2002" (Table D) and "Distribution of Special District Governments by Function: 2002" (Chart C). No less a figure than Alexis de Tocqueville commented on the important role municipalities and townships play in the daily life of the American people. See de Toqueville, *supra*, at 54-72.

Many of the essential public services provided by local governments—such as hospitals, libraries, schools,

cemeteries, parks—benefit especially the poor. For example, the annual median household income in the Commonwealth of Puerto Rico in 1989 was less than $9,000. See U.S. Census Bureau, "Report on Puerto Rico, Social and Economic Characteristics: 1990" (Table 77). Many of our citizens rely on the essential public services provided at the municipal and local government level. But if civil rights law generally and the qualified immunity doctrine in particular produce excessive claims and social costs, resulting in the overdeterrence of government action, the ultimate victims are the most vulnerable and disadvantaged of our citizens.

Furthermore, local governments generally have a much smaller and narrower tax base and do not have the variety of tools that federal and state officials have for raising revenues. For example, in the Commonwealth of Puerto Rico, municipalities receive a large fraction of their revenues from the imposition of a special business tax (the *patente municipal*) on firms within their jurisdictions. Thus, many of Puerto Rico's small and geographically-isolated municipalities, such as Sabana Grande, confront significant constraints for raising additional revenues. The Municipality of Sabana Grande is a case in point. There were only 64 business establishments (i.e. firms with payroll) within Sabana Grande's jurisdiction as of 1992. See U.S. Census Bureau, "Kind of Business Groups for [Puerto Rico] Municipios: 1992" (Table 6).

One final point. The First Circuit's subjective standard purports to do justice to public employees who feel they are the victims of a constitutional violation by giving them their day in court. But in reality, the subjective standard may do more harm to public employees in the aggregate than good. For we must also consider what effect on new hires it may have. The overdeterrence effects of the subjective standard may be so great that mayors will think twice before hiring someone they do not personally know. Ironically, such an outcome would perpetuate the problems of cronyism and nepotism that plague many local governments.

CONCLUSION

The *amici* municipalities are not proposing that this Court turn "back the clock" on civil rights. We only ask the Court to consider the unforeseen consequences of the First Circuit's subjective qualified immunity standard. The hidden but measurable consequences of a qualified immunity doctrine that results in almost unqualified liability include the impositions of enormous social costs on the public at large, the promotion of inefficient rent-seeking behavior, and the consumption of scarce judicial resources. Government employers, government employees and citizens who are the beneficiaries of the services provided by the local government all benefit from a clearly articulated and objective standard for constitutional conduct.

Respectfully submitted,

Frank Guerra
Pontifical Catholic Univ. of
Puerto Rico, School of Law
Ponce PR 00717-0777
(787) 348-4038

Carlos Del Valle
PO Box 9022473
San Juan PR 00902-2473
(787) 306-8298